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SUPREME COURT DECIDES AGAINST WALTER G. SMITH

Frear and Galbraith Uphold Action of the Circuit Court In Contempt Case.

Perry, In a Strong Opinion, Dissents From the Court's Opinion and Holds That Constructive Contempt Cannot Be Punished.

AFTER more than two months of deliberation a majority of the Supreme Court yesterday affirmed the decision of the Circuit Court, adjudging Walter G. Smith, Editor of the Advertiser, guilty of contempt, and remanding him to the custody of the High Sheriff to serve a term of thirty days imprisonment.

As there appears to be a Federal question involved Mr. Smith's attorneys will present their application for a writ of habeas corpus to the United States District Court this morning and push the matter to the last step before abandoning it.

"In the case of ex parte Walter G. Smith, the court remands the prisoner to the custody of the High Sheriff; the opinion of the court will be filed." With these words from Chief Justice Frear, the Supreme Court, Justice Perry dissenting, yesterday affirmed the decision of the Circuit Court, finding Mr. Smith guilty of contempt and sentencing him to prison for thirty days.

There were but few people in the court room yesterday afternoon at 2 o'clock, when the three Justices filed slowly into the room, and took their places on the bench. Mr. Smith was present in person, and was represented by Smith & Lewis and Lorrin Andrews, while George Davis appeared for the Circuit Judges, who remained outside in the clerk's office as the decision was announced. There were besides three or four attorneys in the court room when the judgment was given.

Following the order made by Chief Justice Frear the members of the court left the room, the opinion having been given to Clerk George Lucas. Davis got possession of the original and after it had been shown to a few attorneys, he hurried into the clerk's office, where Judges Humphreys and Clear were in waiting. They spent the next hour in poring over its pages and commenting on the opinions of the three Judges. Mr. Smith was at once placed in the custody of Sheriff Chillingworth.

ESTEE WOULD ISSUE WRIT.

In the meantime attempt was made to secure a new writ from Judge Estee, but because of the lateness of the hour this was given up until morning. Judge Estee very accommodatingly agreed to wait until 5 o'clock to sign the papers, and stated that he would issue the writ of habeas corpus and hold court at 8 o'clock in the evening to hear the matter if the attorneys so desired. The attorneys found it impossible to prepare the necessary papers and further action was postponed until this morning.

THE DECISION.

The decision of the Supreme Court remanding the prisoner to the custody of the High Sheriff is a voluminous one. It is written by Chief Justice Frear, and Justice Galbraith writes a concurring opinion. Justice Perry dissents and also has a lengthy opinion.

The following is the syllabus governing the opinion of the majority:

"On habeas corpus to test the validity of a judgment for contempt the court may consider questions of jurisdiction only and not questions of mere irregularity of error.

"All reasonable intendments are made in favor of the jurisdiction of superior court of record when their judgments are attacked collaterally.

"Whether an answer under oath by one cited for contempt operates as a purger or not depends on the circumstances.

"Whether all three Judges of the First Circuit may act together as a court or not is immaterial if, when they do sit together, the presiding Judge for the term substantially conducts the proceedings and finally pronounces judgment as if he alone constituted the court, the others being deemed to act in an advisory capacity only."

The opinions are as follows:

OPINION OF THE COURT, BY FREAR, C. J.

The facts and much of the law are set forth in Mr. Justice Perry's dissenting opinion. The case is one of great difficulty.

There is no doubt that the publication in question would be held a contempt at common law—whether it should be regarded as relating to a pending case or to a terminated case, or to the Judge generally without reference to any particular case, or whether it was in the presence of the court or not. There is also no doubt that it should be held a contempt under our statutes, if the decision in the Bush case, 8 Haw. 221, should be followed; for, according to that decision, the Legislature in providing, by the act of 1898 (P. L. Sec. 262), that constructive attempts should no longer be punishable as such, regarded as constructive attempts only those that were not enumerated in the previous statute (P. L. Sec. 257) and did not mean to include all those that are generally regarded as constructive contempts, and the publication in question clearly comes within at least one of the classes enumerated in the previous statute.

If, therefore, this should be regarded as a case of constructive contempt under the general law, the main question for consideration would be whether the decision in the Bush case should be followed or reversed. Assuming that the decision was sound when it was rendered, there might still be a question whether the publication, if it could be considered as relating only to the terminated case or to the Judge generally, and not to the pending case, could be regarded as a contempt punishable summarily, now that we have come under the provisions of the Federal Constitution relating to freedom of speech and of the press, which, although not differing materially from the corresponding constitutional provisions in force here when the Bush case was decided, might perhaps be construed differently to some extent. See State v. Circuit Court, 97 Wis. 1.

But must we regard this as a case of constructive contempt under the general law? It may have been such in fact. We may have found it such if we had passed upon the question in the first instance, or we might find it such if the case were here on appeal, or perhaps even on writ of error. But must we regard it as such in these habeas corpus proceedings? The Circuit Court is a court of general and superior jurisdiction. Contempt cases are not appealable or subject to review by writ of error under our statutes. Habeas corpus is a collateral proceeding. In a collateral proceeding mere irregularities and errors cannot be inquired into as on appeal or error; only questions of jurisdiction can be inquired into, and every presumption is indulged in support of the jurisdiction of a superior court. On appeal or error, judgments of superior courts, at least if the jurisdiction is limited, may be set aside, if jurisdiction does not appear on the face of the record, but on habeas corpus they may be set aside only when jurisdiction affirmatively appears to be wanting.

In Cuddy, Petitioner, 131 U. S. 280, the petitioner sought release on habeas corpus from a judgment of contempt. The act constituting the contempt was set forth in the judgment, but it did not appear whether the act was committed in the presence of the court or not and so whether it was covered by the statute or not. Counsel contended that the act was not committed in the court building or while the court was in session, and that the case was therefore distinguishable from another case that was argued and decided at the same time, in which it was held that an act committed in a room near the court room and while the court was in session was "in the presence" of the court. It appeared that the act consisted of an attempt to influence one who had been impanelled as a juror for the term but before he was called for the particular case. Apparently it was in fact (as appeared by the record of the lower court, in re Cuddy, 40 Fed. R. 62, but not by the record in the Supreme Court) committed a quarter of a mile from the court house and when the court was not in session. The court said in substance that neither the petition for the writ nor the part of the record of the lower court that was produced showed the particular locality where the act was committed, and that upon a collateral attack by habeas corpus every intendment was made in support of the jurisdiction of superior courts, and remanded the petitioner to custody.

The present case is before us in a very unsatisfactory state. The mittimus seems to refer to two convictions, both, however, apparently intended to cover the same or nearly the same ground, the one referring for the facts to the affidavit on which the citation was issued, the other purporting to set forth the facts and, among other things, stating that the published matter was false, malicious, etc., and had special reference to the case on trial and to the Judge presiding therein, and was circulated and published in the court room during the trial of the case, that it was calculated to and did prejudice the minds of the jury and prevent a fair and impartial trial and was calculated to and did obstruct the court in the administration of justice, and in its duties in the trial of the case then pending and undetermined. What purports to be a transcript of the stenographer's notes of the proceedings shows only one conviction, which refers to the affidavit for the facts. It contains also an oral opinion delivered by another Judge who was with the trial Judge on the bench; also the testimony of certain witnesses, which shows that the jurors in the pending case saw the alleged contemptuous publication in the hall and room adjoining the court room, if not in the court room itself, but does not show what the petitioner had to do with its circulation in or near the court room as distinguished from the city at large, nor does it show whether the court was in session at the time. Whether the presiding Judge himself saw the paper circulated in the court room during the trial does not appear except by the recital in the mittimus. The transcript does not indicate that it contains all the evidence, though there is nothing to show that it does not, nor is the usual stenographer's certificate attached to it, though it is signed by the stenographer, nor was it made a part of the record in this court, nor does it purport to have been filed or to be a part of the record in any court. We would be justified, however, in overlooking these irregularities as counsel on both sides have taken it for granted that the transcript was complete and a part of the record. The affidavit sets forth in substance that the petitioner made and published for circulation the matter in question, intending thereby to throw disrespect upon the Judge and to present the former action in a ludicrous, etc., manner, and to prejudice the case in the minds of the public and jury trying the cause, and that by reason of said published matter and intending to publish animadversions on the evidence or proceedings in a pending trial tending to prejudice the public respecting the same and to prevent and obstruct the administration, and by knowingly publishing an unfair report of the proceedings of the court and malicious invectives against the court and jury tending to bring the administration of justice into contempt, etc., did commit a contempt of court. No allegation was made in the petition, nor was any offer made in this court to show just where or under what circumstances the publication and circulation took place, nor was any attempt made to show these things in the lower court by the testimony of the witnesses for the petitioner or on cross examination of witnesses against him or in any other manner than by the petitioner's answer, under oath, denying knowledge of the pendency of the second case and alleging that the publication related to the first case only.

The contention that the petitioner thereby purged himself of the contempt cannot avail in this collateral proceeding, considering that the lower court found against him and considering all the circumstances under which that finding was made, assuming that in our opinion the finding was erroneous. We must in these proceedings regard the publication as relating to the pending case.

Thus, it is not clear whether the court found that the publication or circulation took place in the court room or not, and it would seem to be immaterial whether it was in the court room or in the adjoining hall or room, if the other necessary conditions were present. It is not clear whether the court was in session or not. Perhaps that also would be immaterial, if it was during a recess merely or temporary adjournment from one day to the next, and if the other essential features were present. It is not clear whether the petitioner had anything to do with the publication or circulation in or near the court room or not. This is very material, unless the petitioner should be regarded as responsible in law for the publication and circulation there as a natural and probable consequence of the publication and circulation of a paper or such general circulation in the city where the trial was pending. Whether he should be thus held responsible is a nice question, the affirmative being held by very respectable authority, and no argument or authority having been presented on behalf of the petitioner in support of the negative. Whether the decision in the Bush case which, if followed, requires us to remand the petitioner to custody, in any view that can properly be taken of the case on the evidence, should be reversed, is also, to say the least, a nice question—upon which no argument has been presented on behalf of the petitioner, although that decision is most strenuously urged contra.

If, as is the case in some other jurisdictions, contempt cases were appealable under our statutes, and this case were before us on appeal, or, if the statute required the court in adjudging a contempt to explicitly set forth all intermediate necessary findings upon which the final judgment is based, the result might perhaps be different. But in the absence of such findings or of an affirmative showing of want of jurisdiction either by the record or by matter outside of the record, the judgment cannot be set aside in a collateral proceeding.

The fact that all three Judges of the Circuit Court sat at the hearing of the contempt case does not make the proceedings void. Whether they might properly all sit as a court, it is unnecessary to say. For, although during the earlier stages of the hearing they seem to have regarded themselves together as constituting the court, yet the part that the Judges other than the presiding Judge took was unimportant and was joined in by the presiding Judge, and before the end of the case the view was apparently taken that the two former were there in an advisory capacity only, and the presiding Judge alone finally pronounced judgment in form as if he alone constituted the court.

The case as a whole presents many fertile themes for comment, but it is unnecessary to discuss them.

The petitioner is remanded to the custody of the High Sheriff.

Smith & Lewis and Andrews, Peters & Andrade, for the petitioner.

George A. Davis, contra.

DISSENTING OPINION OF PERRY, J.

The petitioner was sentenced to imprisonment for the term of thirty days for an alleged contempt of the Circuit Court of the First Circuit and then brought this petition for a writ of habeas corpus to determine the legality of such sentence and commitment. Many questions are presented.

One McCarthy was tried in the Circuit Court upon a charge of mayhem. The jury returned a verdict of guilty. Thereafter, upon motion of counsel, the court discharged the defendant on the ground that there is no such crime known to our law as mayhem. This was on March 5, 1902. On March 11, McCarthy was arraigned before the same court on a charge of assault and battery based on the same acts, and the trial was begun. In its issue of the day following, and while the trial was still pending and the case undetermined, The Pacific Commercial Advertiser, a newspaper printed and published in this city, of which newspaper the present petitioner was then the editor, contained a certain cartoon and certain printed words said to be of and concerning the Hon. George D. Gear, who was the Judge presiding at the two trials referred to. One of the attorneys for the defendant on the day last named presented to the court a motion or affidavit praying that the editor of The Advertiser be cited to appear and show cause why he should not be summarily punished for contempt of court, charging in the affidavit that the editor "did make and publish for circulation an insulting, contemptuous, con-

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A NEW SAINT TO THE RESCUE

ADMIT THEIR DEFEAT

Home Rulers Give Up the Fourth District.

COUNTY BILL THE PET MEASURE

At Meeting Held Last Night Plans for Campaign are Disclosed.

SIX months before the election the sages of the Home Rule party admit that they are beaten in the Fourth district, and that if they do not carry the Island of Oahu they are without hope. These conclusions were voiced last night at a conference held in Foster Hall by some of the leaders, among them John Emmeluth and Prince Cupid.

County government is to be the slogan of their campaign and their efforts are to be centered upon getting a sufficient representation in the Senate to override a Governor's veto of their pet measure.

Part of the plan by which the Home Rulers will endeavor to corral votes was disclosed last night. The managers of the party, so the suggestion was given, are to go to leading men and say to them: "If we get this measure (county bill) through, we will put you up for Treasurer, you for Clerk, you for Surveyor," and so on, and the belief exists amongst the leaders that these men, after receiving such promises, will work for the election of Home Rule Legislators.

The Home Rulers feel that J. O. Carter is a man that they want in the Senate, because of his familiarity with finances, public affairs, and his well known spirit of fairness. He was talked of last night as a possible candidate. Sol Meheula, the Secretary of the House in the last Legislature, was also suggested as a candidate for the lower house in the Fourth district. Mahoe of Waialua, the Home Rule representative who introduced the "lady-dog" and other bills in the Legislature, is not deemed a desirable man for the House next session.

"We are beaten in the Fourth District," said Emmeluth. "This is the time we cannot take any chances. Every man must get to work for the party. We can afford to lose the Fourth District so far as the Representatives are concerned, as we can make it up outside. We must, however, control the Senate. We will carry the Fifth District straight. If we can manage to effect a coalition of the Democrats and Home Rulers on this island we can carry the island. If we have a two-thirds majority in both Houses we are safe. If we don't carry Oahu the Home Rulers are up a stump."

As to any county bill, Emmeluth declared that if the Home Rulers had nine votes in the Senate and the Governor vetoed the bill, there was a Republican Senator whom he knew would stand by and vote with the Home Rulers, which would enable them to carry the bill over the Governor's veto. He mentioned the name of Senator Crabbe.

The name of Sam Dwight, of Allen & Robinson, was mentioned as a possible candidate for the House to run in the Fifth, his chief merits being that he was a hard worker and would stand by the county bill.

The Home Rule leaders are of the opinion that the Democrats are ahead of the Republicans in numbers on the Island of Maui, and that if a fusion were effected with them, some changes would take place on that island in favor of the Home Rulers.

Guy Owens left his horse and buggy in front of Harmony Hall, while attending a meeting, last night, and some one drove away with the rig. Up to a late hour it had not been found.

Ernest Thrum, who has been lying seriously ill for the past week, was very low last night.

John Hassinger was reported in a low condition last night.